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No. _____

In The

Supreme Court of the United States

October Term, 1994

FIRST PACIFIC BANK and FIRST PACIFIC BANCORP, INC.,

Petitioners,

v.

JAMES E. GILLERAN, SUPERINTENDENT OF BANKS, CALIFORNIA STATE BANKING DEPARTMENT, and FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the judicial review proceedings under Cal. Fin. Code § 3101, which provides for a trial court "hearing" to determine "the facts upon the merits" concerning the legality of a state seizure of a banking institution, can be limited consistent with the commands of the Due Process Clause to summary judgment procedures conducted without any discovery by the seized institution and only upon the administrative record prepared by the state without any administrative hearing.

LIST OF PARTIES

Plaintiffs-Appellants below were First Pacific Bank, a California-chartered bank, and First Pacific Bancorp, Inc., as controlling shareholder of First Pacific Bank. Defendants-Appellees were James E. Gilleran, the California Superintendent of Banks, the California State Banking Department, and the Federal Deposit Insurance Corporation.

Pursuant to Supreme Court Rule 29.1, First Pacific Bancorp, Inc. is identified as the parent of First Pacific Bank. Neither First Pacific Bank nor First Pacific Bancorp, Inc. has subsidiaries other than those wholly owned.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, First Pacific Bank and First Pacific Bancorp, Inc., respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 40 F.3d 1023 (9th Cir. 1994), and is included in the Appendix at pp. 1a-14a. The order of the court of appeals denying

rehearing is included in the Appendix at pp. 36a-37a. The decisions of the district court denying the motion for summary judgment and granting the renewed motion for summary judgment are unreported and are included in the Appendix at pp. 15a-27a and 28a-35a, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1994. Rehearing was denied on January 12, 1995. On April 5, 1995, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including May 12, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was based upon 28 U.S.C. § 1291, and in the district court upon 12 U.S.C. § 1819(b)(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that –

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that –

> No person shall be . . . deprived of life, liberty, or property without due process of law; nor

> shall private property be taken for public use, without just compensation.

U.S. Const. amend V.

Section 3100 of the California Financial Code, Cal. Fin. Code § 3100, provides, in pertinent part:

> Whenever it appears to the superintendent that:
>
> (a) The contributed capital of any bank is impaired;
>
> * * *
>
> the superintendent may forthwith take possession of the property and business of such bank and retain possession until such bank resumes business or its affairs be finally liquidated as herein provided. Such bank, with the consent of the superintendent, may resume business upon such conditions as he may prescribe.

Section 3101 of the California Financial Code, Cal. Fin. Code § 3101, provides:

> Whenever the superintendent has taken possession of the property and business of any bank, such bank, within 10 days after such taking, if it deems itself aggrieved thereby, may apply to the superior court in the county in which the head office of such bank is located to enjoin further proceedings. The court, after citing the superintendent to show cause why further proceedings should not be enjoined and after a hearing and a determination of the facts upon the merits may dismiss such application or enjoin the superintendent from further proceedings and direct him to surrender the property and business to such bank.

STATEMENT AND INTRODUCTION OF THE CASE

This case arises out of the California state government's seizure of a bank. Petitioners First Pacific Bank (the "Bank") and First Pacific Bancorp, Inc., the Bank's holding company, brought the action in state court pursuant to Cal. Fin. Code § 3101 after the Bank was seized by James Gilleran, the California Superintendent of Banks and the head of the California State Banking Department (collectively, the "State"). The State appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver for the Bank. The State's seizure decision was made *ex parte* and without prior notice or hearing of any kind. The Bank's court action for review of the seizure was thus the first opportunity for a hearing it had ever had on this issue before any tribunal – either before or after the regulatory takeover. This hearing, however, was rendered meaningless by the summary procedures urged by the State, adopted by the district court, and upheld by the Ninth Circuit.

The State had resisted all discovery in the matter and responded to the complaint by moving for summary judgment on the ground that certain interim unadjusted financial statements of the Bank purportedly established that the Bank's contributed capital was impaired under California law. The district court ultimately granted the motion without permitting any discovery by the Bank. Thus, the Bank was afforded no opportunity to review requested documents, or to take testimony from and cross-examine the State's witnesses, and was forced to make its response to the seizure based on whatever information it could glean from the State's "administrative

record," a record prepared solely by the State without the benefit of any adversarial or even administrative proceedings in which the Bank was involved.

Significantly, a similar federal statute has been applied in an inconsistent manner with respect to the due process questions raised in this petition, thus raising a serious national issue concerning the scope of due process protection applicable to seizures of financial institutions. The Ninth Circuit's ruling allows government agencies to seize financial institutions without notice of any kind and without even any post-seizure proceedings that permit adequate protections to ensure a lawful seizure. This ruling does violence to the procedural due process rights of the financial institution and its owners and cannot be squared with the decisions of this Court.

A. Factual Background And Proceedings Before The District Court

First Pacific Bank was a state-chartered bank with over $100 million in assets. On August 10, 1990, without any prior notice or opportunity for the Bank to be heard, the State seized the Bank pursuant to Cal. Fin. Code § 3100. Section 3100 provides that "[w]henever it appears to the superintendent that . . . [t]he contributed capital of any bank is impaired . . . the superintendent may forthwith take possession of the property and business of such bank." The State's "Order Taking Possession of Property and Business" recited a finding that, among other things, "[t]he contributed capital of the Bank is impaired." As support for this finding, the order attached a "Consolidated Balance Sheet as of July 31, 1990," which purported

to show that, based on the Bank's books, the contributed capital of the Bank was impaired and when certain state-mandated write-downs of the Bank's assets were taken, an even greater impairment was shown.

In accordance with the provisions of Cal. Fin. Code § 3101, the Bank and its owners brought an action to reverse the seizure. Section 3101 provides that, within ten days of seizure, a bank may apply to a court to enjoin further proceedings by the State. The court, "after a hearing and a determination of the facts upon the merits[,] may dismiss such application or enjoin the superintendent from further proceedings and direct him to surrender the property and business to such bank." Cal. Fin. Code § 3101. The Bank alleged that its contributed capital was not impaired and that the State's write-downs were improper and without basis in fact, thus the seizure was unjustified.[1]

The State moved for summary judgment on the narrow ground that its seizure should be upheld because the Bank's own financial statements showed that the Bank's

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[1] The Bank concurrently moved pursuant to § 3101 for an order to show cause why an immediate injunction should not enter. That motion was ultimately deferred. The Bank later moved to stay the liquidation of the Bank pending the outcome of this action challenging its seizure, and filed an amended complaint joining the FDIC, which was liquidating the Bank as the State's receiver, as a defendant (this joinder resulted in the removal of the case to federal district court). Because the district court chose to act first on the State's summary judgment motion, the motion for a stay of liquidation was never ruled and was rendered moot when summary judgment was granted. *See* App. at 34a n.6.

contributed capital was impaired pursuant to a California statute.[2] Cal. Fin. Code § 134 provides that "contributed capital" means "all of shareholders' equity other than retained earnings," *id.* § 134(a), and "the contributed capital of a bank shall be deemed to be impaired whenever such bank has deficit retained earnings in an amount exceeding 40 percent of such contributed capital," *id.* § 134(b). Citing those provisions, the State submitted a declaration from a bank examiner to support its motion. The examiner's declaration purported to demonstrate how the Bank's consolidated balance sheet as of July 31, 1990, daily statement of condition as of August 8, 1990, and daily statement of condition as of August 10, 1990 (the seizure date, thus the statement was provided to the State by FDIC), each showed an impairment of contributed capital under the "forty percent test" of § 134(b).

The Bank had previously served the State with its initial discovery requests, including a request for production of documents, a request for admissions, and a set of interrogatories. The Bank also noticed several depositions, including those of each person who would eventually serve as a declaration witness in support of the State's renewed summary judgment motion. The State objected to each and every one of these discovery requests on the ground that it was not subject to discovery and the court should not consider any evidence outside the State's administrative record. The State provided

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[2] Thus, the validity of the other grounds for the seizure contained in the State's order, and of the capital write-downs set forth in that order, although challenged by the Bank, were not placed at issue.

the court and the Bank with this so-called "administrative record," consisting of documents from the State's files concerning the Bank. The record was unilaterally compiled by the State itself, which withheld a number of documents on various untested claims of privilege, and without the benefit of any hearings or review by a neutral fact finder.

In other words, the Bank's seizure was to be evaluated on the basis of the State's submission to the court, and the Bank – now deprived of access to its own books and records because of the seizure – was left to rely on whatever submissions it might by chance have submitted before the State's *ex parte* seizure. The Bank sought, through a motion for discovery, to compel responses to its discovery requests. This discovery motion and the State's summary judgment motion were filed on the same day (in state court prior to removal). The district court chose to give plenary consideration to the State's summary judgment motion without any discovery, and the discovery motion was never ruled. App. at 34a n.6. This procedure was utilized by the district court even though the declarations submitted by the State in support of its summary judgment motion were not part of the so-called "administrative record."

Notwithstanding the material disadvantage imposed by the lack of discovery or even access to its own records now under control of the FDIC, the Bank attempted to mount a response to the State's summary judgment motion by submitting declarations from its former controller, its chairman, and several independent certified public accountants. Nevertheless, the Bank's evidence

refuted the State's position and, at a minimum, demonstrated that there were genuine factual issues regarding whether the Bank's contributed capital was impaired. In particular, the evidence showed that the State's analysis and application of the statutory test had not considered:

(i) a capital note to the Bank's holding company was contributed capital;[3]

(ii) certain adjustments necessary to make the Bank's interim unadjusted financial statements, relied on by the State, fairly presented in accordance with generally accepted accounting principles – the statutory standard[4] – and normal banking practices reduced deficit retained earnings at the date of seizure;[5] and

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[3] Declaration evidence from the Bank's former chairman (who remained as chairman of the holding company) showed that the State itself had earlier directed that the Note should be included in capital. In a letter to the Bank, the State had indicated that "the capital note may now be included in capital for all purposes . . . . we did consider the contribution in evaluating the bank's capital adequacy."

[4] Cal. Fin. Code § 118(a) requires that retained earnings, shareholders' equity, and similar accounting items of a bank must be "prepared or determined in conformity with generally accepted accounting principles then applicable, fairly presenting in conformity with generally accepted accounting principles the matters which they purport to present."

[5] The Bank financial statements relied upon by the State to conclude that the Bank's capital was impaired were "interim, unadjusted" statements. According to the Bank's former controller with responsibility for its financial statements, these interim, unadjusted statements "were only for internal use" and "provide insufficient information from which to conclude or determine that the capital or shareholders equity of [the Bank]

(iii) a reserve for loan losses and an amount for loan fees collected by the Bank but deferred on its books should be deducted from deficit retained earnings to portray accurately the capital in the Bank at the date of seizure.[6]

When some of these additional facts were considered, forty percent of the Bank's contributed capital *exceeded* deficit retained earnings, thus there was no impairment under the statute.

The district court denied the State's summary judgment motion in an order filed May 15, 1991. App. at 15a-27a. The court stated that "[t]he real issue raised by defendants' motion is this: does a factual dispute exist as to whether contributed capital was impaired on the date that defendant banking superintendent seized plaintiffs' business and assets?" App. at 17a. In applying the statutory impairment test, the court found in favor of the Bank

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was impaired." It was the regular practice of the Bank to prepare adjusted quarterly statements, which accurately depicted the financial position of the Bank. Such adjustments are made in the ordinary course of business and are necessary to state the financial statements in accordance with generally accepted accounting principles.

[6] The evidence showed that the State itself had earlier considered loan loss reserves in applying the forty percent capital impairment test of Cal. Fin. Code § 134(b). In a document contained in the State's administrative record, one of the State's witnesses on the summary judgment motion had applied the forty percent test only after reducing deficit retained earnings by the amount of loan loss reserves, which was consistent with the Bank's position.

that "the capital note should be included in the computation of contributed capital." *Id.* at 21a. The court also found, as the Bank had urged, that "formal accounting adjustments to the Bank's internal trial balances should have been considered by the defendants in their computation of impairment of contributed capital. Fundamental fairness requires that an act as serious as a seizure of a bank's assets and business must not be done on the basis of inaccurate or incomplete information." *Id.* at 25a-26a. According to the court, "a genuine issue of material fact exists as to [the] nature and amount of the adjustments to retained earnings" and "the Court must insist on precision in this computation in view of the extremely small margin of error." *Id.* at 26a. Although the court found further that "allowance for loan losses is not an item appropriately included in the computation of contributed capital," *id.* at 24a, the Bank's capital was not impaired under the court's analysis because of the inclusion of the capital note in contributed capital and the adjustments which reduced deficit retained earnings. *Id.* at 25a n.7. In summary, the district court concluded:

> [I]n view of the Court's determinations that the capital notes may be included in the computation of contributed capital of the bank and that a genuine issue of fact exists as to the amount of the required adjustments to the bank's retained earnings, the Court finds that a genuine issue of material fact exists as to whether contributed capital was impaired on the date of the superintendent's action. Therefore, defendants [sic] motion for summary judgment must be denied.

Id. at 26a. The court noted that its denial of the motion was "without prejudice" and that supplementation of the

materials provided to the court could perhaps absolutely resolve the impairment issue raised by the motion. *Id.*

Seizing upon the court's denial "without prejudice," the State renewed its summary judgment motion. The renewed motion continued to urge that the Bank's own financial statements (as modified by the prior district court ruling) showed a capital impairment, and was accompanied by a new declaration, from yet another bank examiner, which again was never part of the State's administrative record. The sole issue raised by the renewed motion was the amount of the adjustments which reduced deficit retained earnings. The declaration witness claimed to have discovered a discrepancy in one of those adjustments in a declaration submitted by the Bank. Under the State's view, deficit retained earnings were increased to an amount that exceeded 40% of contributed capital by $40,816. The Bank responded to the State's renewed motion with a further declaration from its controller defending his computations, and a further exchange of declarations occurred.

Despite the material factual conflicts in the various declarations, the district court granted the State's renewed motion and entered an order on July 12, 1991. App. at 28a-35a. The court found that the State's declaration witness "appears correct in his contention" concerning the amount of the adjustments which reduced deficit retained earnings. *Id.* at 30a. As a consequence, the court found "no genuine issue of material fact remains as to the proper adjustment." *Id.* at 33a. The result of the district court's resolution of that factual issue was to uphold the seizure of a $100 million bank based on an alleged discrepancy of some $40,000. Conceding that "it may seem

inequitable to grant summary judgment on the basis of a seemingly technical accounting issue," the district court granted summary judgment for the State. *Id.* at 34a.

B. The Court of Appeals' Ruling

The court of appeals affirmed the district court's grant of summary judgment, "but for reasons different than those stated by the district court." App. at 5a. The panel rejected the district court's conclusion, subject to review on a cross-appeal by the State, that the Bank's capital note should be considered contributed capital. *Id.* at 9a-12a. The panel concurred with the district court's refusal to allow deficit retained earnings to be reduced by the amount of the Bank's loan loss reserves. *Id.* at 8a-9a. As a consequence of these findings, the panel did not reach the issue of necessary adjustments to the financial statements – which it observed had "prompted a series of dueling affidavits in the district court" – because the amounts involved would not avert the impairment of contributed capital. *Id.* at 12a.

The panel also dismissed the Bank's arguments concerning the lack of discovery and denial of due process. The panel stated that "[t]he State is justified in seizing a bank when the bank's own financial statements demonstrate that its contributed capital is impaired. When, as in this case, the State has relied on the Bank's own financial statements without making any adjustments, the Bank will be hard pressed to show the relevance of any discovery beyond its own records and the State's administrative

record." *Id.* at 13a. Finding that the district court's summary judgment procedures for judicial review of the seizure did not violate due process, the panel stated "[a]s it was, the Bank was given the opportunity to present evidence. The district court then properly entered summary judgment on the merits." *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

The holding of the Ninth Circuit confers extraordinary authority upon government agencies to seize property belonging to private individuals without ever having to justify the action on the merits. No one quarrels that the government must have authority to act quickly and decisively whenever a financial institution poses a serious risk. But the government's compelling interest in preventing loss through immediate action dissolves once the institution has been seized from private hands. At that point, fundamental fairness requires that the individual whose property has been confiscated be given a full and fair opportunity to prove on the merits that the action of the regulator was unlawful or arbitrary because it lacked a factual basis or was based on false assumptions.

The court of appeals denies the private parties any meaningful opportunity to be heard at any time. Instead of allowing complainants a fair hearing in which to explain to the court why the government's decision to seize the institution was unlawful, the court of appeals' ruling requires complainants to make a blind response to

an early summary judgment motion, without any opportunity for discovery and solely on the basis of the agency's specially prepared and selected record. This is an impossible burden, and it is a process that eviscerates the state statutory right to challenge the seizure "upon the merits" and renders the Due Process Clause a dead letter.

In these circumstances, it is easy to understand why numerous courts have found the need for a meaningful post-seizure hearing in which challenging parties are given an opportunity to shape the record with their own submissions and to challenge the government's factual claims through cross-examination. *See infra* pp. 17-18. This divergence of judicial opinion on an issue that is fundamental to the regulation of the financial institutions industry warrants review by this Court. This case presents a perfect vehicle for addressing the question of applicable due process protections upon the government seizure of a financial institution.

1. This case is essentially an action for judicial review of the Bank's seizure, brought pursuant to a special state statute that provides for such review. Cal. Fin. Code § 3101. This judicial review statute provides that the court, *"after a hearing* and a determination of the facts *upon the merits*[,] may dismiss such application or enjoin the superintendent from further proceedings and direct him to surrender the property and business to such bank." *Id.* (emphasis added). The *ex parte* seizure in this case was not preceded by any formal administrative proceedings that afforded the Bank a hearing before a neutral finder of fact on the issues that lead to the seizure. Rather, the only hearing the Bank will ever get on those

issues is in this court action pursuant to the judicial review statute. That hearing, however, was rendered meaningless by the district court's grant of summary judgment and the court of appeals' affirmance. The procedure sanctioned by the courts below – early disposition of complex issues on summary judgment without any opportunity for discovery – is inconsistent with the most fundamental elements of due process.

Something more than a summary disposition without discovery is required to fulfill the requirements of due process. Indeed, the language of the state statute itself strongly implies that seized banks are entitled to evidentiary hearings and that the trial court must enter factual findings either upholding the seizure or striking it down. Such a hearing would, of course, be meaningless without an opportunity for discovery. Any other approach would give little assurance that the undeniable property rights of an institution's owners are protected. Even the district court noted the "extremely small margin of error" involved here, App. at 26a, and the seeming inequity of disposing of the case on a "technical" issue, App. at 34a, but it nonetheless summarily terminated the Bank's review rights based on such a narrow view.[7]

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[7] The district court found that the law "only" required the court to hold a hearing and determine the facts, and that it had fulfilled those requirements by holding a hearing on the summary judgment motion and determining facts based on the declarations. App. at 34a n.7. Perhaps the court's momentary hearing, recorded in a six-page transcript, and findings based upon a flurry of affidavits without any discovery comply with some formalistic notion of process, but they were devoid of the substance required by the Due Process Clause.

2. Notably, the federal statutes providing for *ex parte* seizures of financial institutions also contain provisions for judicial review by an action in district court "upon the merits," although without the explicit requirement of a "determination of the facts" contained in the state statute here. *See* 12 U.S.C. § 1464(d)(2)(B) (formerly codified at 12 U.S.C. § 1464(d)(2)(E) and 12 U.S.C. § 1464(d)(6)(a)) (savings and loan associations);[8] 12 U.S.C. § 1821(c)(7) (banks). Considerable confusion exists among the courts concerning the scope of judicial review under these statutes and related due process implications. A host of district courts applying the statute for savings and loan associations have concluded that seized institutions are entitled to an evidentiary hearing, thus rejecting the kind of attenuated proceedings adopted here. *See, e.g., Marietta Franklin Sec. Co. v. Muldoon*, 770 F. Supp. 1212, 1220-21 (S.D. Ohio 1991) ("[a]fter a thorough review of the multitude of cases concerning the role of court review permitted within this area . . . the Court feels that the parties should be able to supplement the Administrative Record"), *appeal dismissed*, 972 F.2d 128 (6th Cir. 1992); *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 904 n.3, (D.D.C. 1990) (due process and the statute require the court to undertake a level of inquiry beyond a simple review of the government's record; court held a "wide

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[8] Under the Home Owners' Loan Act of 1933, this judicial review provision was originally designated § 1464(d)(6)(a). The Financial Institutions Reform, Recovery and Enforcement Act of 1989 redesignated the provision as § 1464(d)(2)(E). The Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991 again redesignated the provision, as § 1464(d)(2)(B).

ranging" evidentiary hearing during which oral testimony and documentary evidence were received); *Collie v. FHLBB*, 642 F. Supp. 1147, 1149-52 (N.D. Ill. 1986) (institution must have "a meaningful opportunity to make a case in opposition to the appointment . . . . [i]f it has not, then the court should provide that opportunity"); *San Marino Sav. & Loan Ass'n v. FHLBB*, 605 F. Supp. 502, 508 (C.D. Cal. 1984) (court permitted trial on issue that led to seizure); *Fidelity Sav. & Loan Ass'n v. FHLBB*, 540 F. Supp. 1374, 1377 (N.D. Cal.) (reviewing court may go beyond government record and review action *de novo*), *rev'd on other grounds*, 689 F.2d 803 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); *Telegraph Sav. & Loan Ass'n v. FSLIC*, 564 F. Supp. 862, 869-71, 875 (N.D. Ill. 1981) (denying summary judgment and holding that seized institution "must be accorded a full opportunity to present evidence and cross examine witnesses on the issue of whether the [government's] conduct met the statutory requirements"), *aff'd*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983).

On the other hand, two court of appeals decisions have taken a narrower view, although without confronting the due process issue presented here. In *Guaranty Savings & Loan Association v. FHLBB*, 794 F.2d 1339, 1342 (8th Cir. 1986), and *Franklin Savings Association v. Director, Office of Thrift Supervision*, 934 F.2d 1127 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992), the courts found review restricted to the government's administrative record. The *Guaranty* court did not address the Due Process Clause. In *Franklin*, the court did not review the due process issue because it found that the institution had objected to the lack of a *prior* hearing. 934 F.2d at 1140. This Court found in *Fahey v. Mallonee*, 332 U.S.

245 (1947), that the Constitution did not require an adjudicatory hearing prior to seizure of a financial institution. The issue here, however, concerns the *level of post-deprivation procedures* required to comport with due process when there are no pre-deprivation procedures.

A third court of appeals opinion, *Woods v. FHLBB*, 826 F.2d 1400 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), explicitly found that the absence of pre-deprivation process in financial institutions seizures heightens the need for post-deprivation procedures. *Id.* at 1411. In that case, the court found due process satisfied when, among other things, there had been a formal administrative cease and desist proceeding which provided the institution a full and fair opportunity to present its case. *Id.* at 1412; *see also Gibraltar Sav. v. Ryan*, 772 F. Supp. 1290, 1295 (D.D.C. 1991) (rejecting contention that due process required heightened post-deprivation procedures).

The Ninth Circuit decision – which severely truncates review of a financial institution seizure – thus exacerbates the continuing confusion and conflict among the courts on this recurring issue implicating significant constitutional concerns.[9] As demonstrated above, the courts have reached different conclusions concerning the process due a seized financial institution.

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[9] Several commentators have highlighted the due process issues presented here. *See* Comment, *Due Process Considerations in The Federal Takeover of Savings and Loan Associations: The Case for a Hybrid Manner of Review*, 40 Kan. L. Rev. 1065 (1992); Note, *Franklin Savings v. Office of Thrift Supervision: A Case of Judicial Interpretation Creating a Due Process Dragon*, 6 B.Y.U.L. Rev. 587 (1992).

3. "A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citation omitted) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). The lower courts in this case, however, held that the Bank's "hearing" should have been no more than review of a paper record compiled without discovery and consisting solely of summary judgment affidavits and items from the State's "administrative record." The court thus adopted a cramped notion of judicial review that denies any meaningful opportunity to be heard.

In cases like this one, where substantial property interests have been confiscated, there is a right to a full measure of process: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' " *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).[10] Where pre-deprivation process is denied, due process requirements are satisfied by a "full and immediate" post-deprivation hearing. *Mitchell v. W.T. Grant Co.*,

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[10] The requirements of due process apply to administrative agencies. *See Withrow v. Larkin*, 421 U.S. 35, 46 (1975). Judicial review plays an important role in ensuring fair administrative processes. "[O]ur system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). "Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion." *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971).

416 U.S. 600, 611 (1974); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262, 271 (1987). Indeed, in *Woods v. FHLBB*, 826 F.2d 1400, 1411 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), the Fifth Circuit found that "the absence of pre-deprivation process heightens the need for post-deprivation procedures" in cases involving seizures of financial institutions.

This Court has held that where there is no "initial check against mistaken decisions" and the property interests at stake are substantial, an evidentiary hearing must be held before the government can conclusively terminate a legitimate claim of entitlement. *See Brock*, 481 U.S. at 261, 263 (requiring a complete and expeditious review following minimal notice). Furthermore, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269.[11]

This Court's familiar balancing test for determining due process rights requires consideration of three factors:

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[11] "When the agency making the decisions relies on evidence that the claimant has no chance to refute, the hearing becomes infected with a procedure that lacks that fundamental fairness the citizen expects from his government." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 720 (1963) (Douglas, J., dissenting); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring) ("The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.").

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Consideration of these factors confirms that due process requires more than the summary adjudication without discovery adopted by the lower courts.

First, the interest of the Bank and its shareholders could not be more significant, for the very livelihood and existence of the Bank are at stake. The appointment of a receiver is the functional equivalent of a corporate "death penalty." It is the most severe enforcement measure available to the State.

Second, it is difficult to conceive of a procedure less likely to provide an accurate adjudication than that adopted here. The procedure adopted here is fundamentally at odds with core principles of due process: (1) review is confined solely to a paper record without any evidentiary hearing, discovery, or cross-examination, a strongly disfavored practice;[12] (2) the State's administrative record is not compiled and acted upon in the first

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[12] *See Califano v. Yamasaki*, 442 U.S. 682, 696 (1979); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *Londoner v. City of Denver*, 210 U.S. 373, 386 (1908); *Gray Panthers v. Schweiker*, 652 F.2d 146, 158 (D.C. Cir. 1980). As this Court has noted in another context, a grant of summary judgment should occur only "after adequate

instance by a neutral decisionmaker, rather the State alone prepares it and submits it with the contention that it is the only evidence the reviewing court may consider;[13] and (3) the State's administrative record (which it cited as the basis for refusing to submit to discovery) is prepared and compiled essentially in secret and without the knowledge of the institution, as a function of the *ex parte* nature of the seizure.[14]

A procedure of this type bears serious risk of permitting erroneous seizures. The seized institution, already deprived of its resources, employees, and records, is largely precluded from presenting probative evidence and is thus left in the impossible position of challenging a decision based on whatever informal submissions it may have provided to the State before the seizure and which the State then chose to include in its record. Procedural safeguards, such as discovery and an evidentiary

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time for discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also* Fed. R. Civ. P. 56(f).

[13] *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 & n.2 (1980).

[14] As commentators have noted, "[t]he absence of a formal adjudicatory record justifies . . . a presumption in favor of district court review. Without such record, a judicial trial will very often be necessary to determine either the basis upon which the administrator acted or the facts relevant to an evaluation of his action." Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 57 (1975).

hearing,[15] would substantially increase the degree of assurance that the State's discretion is not being abused.

Finally, the government interest is not harmed by additional procedures. The interest in permitting the State to take prompt action, *see Fahey*, 332 U.S. at 253, is not burdened by providing additional procedures *after* the State takes that action. Once the institution is under government control, there is no legitimate interest in so severely constraining the review procedure.

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[15] The Ninth Circuit's suggestion that the Bank was delinquent in failing to seek discovery from the FDIC (as contrasted with the State) misperceives the issue here. When the district court granted summary judgment in this case there was a pending motion to compel discovery from the State. The State had objected to all discovery and opposed the motion on the ground that the only evidence that could be considered by the court was the State's administrative record, a position that effectively made all discovery futile. The district court scheduled the discovery motion for argument, but ultimately concluded that because of its grant of the State's summary judgment motion it "need not reach" the discovery motion. App. at 15a n.1, 27a, 34a n.6. Under these circumstances, the panel's suggestion, App. at 13a-14a, that the Bank should have sought discovery from the FDIC is implausible – the State had already taken the position that such evidence and discovery could not be permitted or even considered in this case, and that was clearly the State's position throughout the litigation. The Bank's discovery motion challenged this position as inconsistent with due process, among other things. Accordingly, any conclusion that the Bank languished in its discovery efforts by failing to seek discovery from FDIC is erroneous – the State was attempting to bar all discovery and the Bank had done all that it could by moving the court to permit discovery.

The summary procedure permitted by the district court and the Ninth Circuit was inconsistent with fundamental principles: "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions . . . . Its purpose . . . is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property." *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972). The Court should grant a writ and review this case because the review provided by the proceedings below was inconsistent with due process in that it denied the Bank a meaningful opportunity to be heard.

* * *

State and federal regulatory authorities wield broad power over financial institutions such as the Bank, and their most severe sanction is the appointment of a receiver to liquidate those private institutions. In recent years, the government has exercised these dramatic powers with greater frequency than ever before in the nation's history. In the normal course of the regulatory process, the issues presented in this case are certain to recur.

This case involves an extreme exercise of government power without adequate procedures to ensure the fairness and accuracy of the government's action. Only this Court can resolve the constitutional issues presented by the review procedure adopted by the lower courts in this case and thereby establish minimum guidelines for judicial review that will guarantee the due process rights of those institutions in the Bank's position.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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